BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KIM D. HEDSTROM	)	
Claimant	)	
VS.	)	
	)	Docket No. 245,995
HALLMARK CARDS, INC.	)	
Respondent,	)	
Self-Insured	)	

ORDER

Both claimant and respondent appealed the February 19, 2001 Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on August 29, 2001.

APPEARANCES

George H. Pearson of Topeka, Kansas, appeared for claimant. Gregory D. Worth of Roeland Park, Kansas, appeared for respondent. Stacy Parkinson of Olathe, Kansas, was appointed Board Member pro tem to serve in place of Board Member David A. Shufelt, who recused himself from this claim.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant alleges she developed both tendinitis and fibromyalgia from the repetitive work activities that she performed for respondent. In the February 19, 2001 Award, Judge Avery determined that claimant was realistically not employable and, accordingly, awarded claimant permanent total disability benefits.

Respondent contends Judge Avery erred. It argues claimant's fibromyalgia was neither caused nor permanently aggravated by her work activities. Respondent also

contends claimant's permanent partial disability benefits should be limited to the whole body functional impairment rating for the bilateral elbow and wrist tendinitis, because that condition neither precludes claimant from earning her pre-injury wage nor from performing any of her prior work tasks. Accordingly, respondent requests the Board to reduce the Award from a permanent total disability to a two percent permanent partial general disability.

Conversely, claimant requests the Board to affirm the Judge's finding that she is permanently and totally disabled. Claimant argues the repetitive work activities that she performed while working for respondent not only caused the bilateral upper extremity tendinitis but also either caused, permanently aggravated, or triggered the fibromyalgia. Claimant also requests the Board to award her unauthorized medical benefits and acknowledge her right to apply for additional medical treatment, should that need arise.

The only issues presented to the Board on this appeal are:

1. What is the nature and extent of claimant's injury and disability?

2. Is claimant entitled to unauthorized medical and future medical benefits?

The Judge determined the appropriate date of accident for this alleged repetitive injury claim was March 17, 2000, as that was the date claimant left work due to her injuries. The parties have not made that finding or the date of accident an issue for this appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Board finds and concludes:

1. The Board concludes that claimant's fibromyalgia was either triggered, intensified or aggravated by the repetitive work that she performed for respondent.

Claimant began working for respondent in 1994. In approximately July or August 1998, claimant's job changed and she began working as a packager and began repetitively lifting cubes of greeting cards weighing from 25 to 35 pounds. Although she had previously experienced symptoms in her arms before that job change, the packaging job made her symptoms much worse. Claimant reported her symptoms to the company nurse several times before respondent finally referred claimant to a doctor.

Claimant first saw Dr. Craig Vosburgh in November 1998. The doctor diagnosed tendinitis in both wrists and elbows. The doctor told claimant to wear wrist splints, limit lifting to less than five pounds and avoid repetitive use.

But before seeing Dr. Vosburgh, claimant had sought treatment on her own as she was experiencing general fatigue and ringing in her ears, among other symptoms, and was seeking answers. Claimant was concerned that she might have Lyme disease or lupus.

In early December 1998, claimant saw a rheumatologist, a Dr. Mhatre, who diagnosed fibromyalgia.

Dr. Vosburgh released claimant to return to regular work as of February 8, 1999, as her symptoms had improved and she was reporting only mild discomfort around the right elbow. The doctor did not see claimant again for her upper extremities until she returned in August 1999. At that time, the doctor diagnosed probable radial tunnel syndrome at the right elbow. The doctor also believed that claimant's bilateral tendinitis was an ongoing problem at that time. The doctor casted claimant's right arm.

Because claimant had questions regarding fibromyalgia, a condition that Dr. Vosburgh did not routinely treat, the doctor recommended that claimant see Dr. Sharon McKinney, whom Dr. Vosburgh knew regularly treated patients having fibromyalgia.

Claimant first saw Dr. McKinney in late September 1999. Dr. McKinney, who is board certified in physical medicine and rehabilitation, began treating claimant and diagnosed bilateral tendinitis in the wrists and elbows and fibromyalgia. The doctor immediately restricted claimant to light duty work with no repetitive activity, no lifting over one pound and no fine motor activity more than five minutes per hour.

Respondent accommodated Dr. McKinney's restrictions by assigning claimant a job reading safety manuals on third shift. The record contains little information concerning this job.

Despite the work restrictions, claimant's condition continued to deteriorate. Although Dr. McKinney actually wanted claimant to remain home, the doctor understood respondent required claimant to work and, therefore, in early January 2000 the doctor placed additional restrictions on claimant, limiting standing to no more than a few minutes per hour and limiting walking. The doctor also indicated that claimant needed to rest as her body dictated.

Claimant worked until approximately March 17, 2000, when she felt she could no longer continue. Towards the end of claimant's employment with respondent, Dr. McKinney recommended that claimant be moved from third shift to first shift as the doctor wanted claimant to develop a normal sleep pattern. For some unknown reason, respondent did not accommodate that recommendation.

Dr. McKinney placed permanent restrictions on claimant in April 2000. The doctor stated that claimant should be off work permanently as even with light duty restrictions she had tried working and her condition was getting worse.

The parties do not dispute that claimant has bilateral tendinitis in her wrists and elbows or that she has fibromyalgia.

According to Dr. McKinney, claimant has a six percent whole body functional impairment for the tendinitis and a five percent whole body functional impairment for the fibromyalgia, both of which comprise an 11 percent whole body functional impairment under the fourth edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*).

Dr. James S. Zarr, who was hired by respondent to evaluate claimant for purposes of this claim, also diagnosed tendinitis in both upper extremities that he rated as a two percent whole body functional impairment. Moreover, Dr. Zarr also testified that the AMA *Guides* would rate claimant's whole body functional impairment from the fibromyalgia at 10 percent.

But the doctors, and thus the parties, do disagree whether claimant's work activities either caused, aggravated, intensified, or accelerated the fibromyalgia.

According to Dr. McKinney, fibromyalgia is a problem involving the muscles where they develop trigger points causing them to cramp and resulting in pain. The condition causes problems sleeping and sometimes causes bowel and bladder problems. Dr. McKinney believes the cause of claimant's fibromyalgia was the speed, repetitive nature and weight of claimant's work.

Conversely, Dr. Zarr, who is also board certified in physical medicine and rehabilitation, testified that the cause of fibromyalgia is unknown but he does not believe that claimant's fibromyalgia was caused by her work. On the other hand, Dr. Zarr believes claimant's work aggravated the fibromyalgia but only temporarily. The doctor also testified that fibromyalgia and myofascial pain were similar maladies but differed in that fibromyalgia affected the whole body whereas myofascial pain affected only a certain region of the body. But despite being similar conditions, the doctor in more than 20 years of practicing medicine had never found that fibromyalgia was work-related as he had with myofascial pain.

When considering the entire record, the Board finds Dr. McKinney's opinions regarding the probable cause of claimant's tendinitis and fibromyalgia the most persuasive. The Board concludes that claimant's fibromyalgia was, at the very least, triggered or intensified by the work that she performed for respondent. Accordingly, the Board

concludes claimant has sustained an 11 percent whole body functional impairment due to the injuries she sustained working for respondent.

2. The Board concludes claimant is entitled to receive permanent partial general disability benefits for a 74 percent work disability (a disability greater than the functional impairment rating).

During litigation of this claim, respondent hired investigators to watch claimant. Investigators either conducted or attempted surveillance on April 11, 12, 13, 15, 21, 2000; June 9, 10, 16, 23, 2000; July 3, 7, 8, 15, 2000; and December 5 and 6, 2000. On several of those dates the investigators videotaped claimant. Although most of the film provides little help, the tapes do show claimant on July 7, 2000, pushing a lawnmower over a sloping yard for approximately 10 minutes. The videotapes also show claimant on December 5, 2000, filling and lifting two small gasoline cans into the back of her car. The following day, the videotapes also show claimant exiting a Dollar General store carrying a sack in her left hand and later leaving another store pushing a cart and placing sacks in her car with her left arm.

Although those activities may not seem significant, they are important when one considers that at the time Dr. McKinney felt claimant should be observing medical restrictions that included no lifting more than one pound, no standing more than a few minutes each hour, and no walking for more than five to 10 minutes each hour. Claimant's mowing activities also seem incongruous to her contention that her condition was so severe she could not work part-time at her parents' liquor store. At the August 2000 regular hearing, which was only one month after claimant had been videotaped mowing her lawn, claimant testified she could not do any physical activities or she would get muscle spasms, and that she could not perform any activity for more than 15 to 20 minutes at a time. Observing claimant mow is also troublesome as Dr. Zarr noted from his September 2000 evaluation that claimant was so sensitive that lightly touching her skin caused significant pain. Considering those apparent inconsistencies, the Board concludes claimant has failed to prove that she is permanently and totally disabled from performing substantial, gainful employment.

Because claimant's injuries comprise an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 1999 Supp. 44-510e. That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was

> earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[1] and *Copeland*.[2] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wages should be based upon ability rather than actual wages when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[3]

As indicated above, Dr. McKinney placed rather severe work restrictions upon claimant. In fact, the doctor's final opinion was that claimant should be off work permanently. The record, however, does not indicate whether Dr. McKinney saw the surveillance videotapes and, if so, whether the doctor would modify claimant's restrictions. According to Dr. McKinney, claimant has lost the ability to perform 14 of 16 former work tasks that claimant performed in the 15 years before her injuries.

On the other hand, Dr. Zarr testified that claimant would have had a 10 percent permanent functional impairment from the fibromyalgia if he had found it work-related and that repetitive work can aggravate fibromyalgia. Dr. Zarr, however, neither stated what permanent work restrictions, if any, claimant should observe due to the fibromyalgia, nor commented on the task loss that claimant sustained from that condition. The doctor did testify, however, that claimant had sustained no task loss due to the bilateral upper extremity tendinitis as she did not need restrictions for that condition.

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[1] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[2] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[3] *Copeland*, at 320.

Unfortunately, the Judge did not appoint a neutral physician to evaluate claimant for determining the nature and extent of claimant's injuries, work restrictions or task loss. Therefore, the only evidence in the record regarding the task loss created by the combined effects of claimant's bilateral upper extremity tendinitis and the fibromyalgia is from Dr. McKinney. As the Board would have preferred input from a neutral physician, the Board somewhat reluctantly concludes claimant has lost the ability to perform 14 of 16, or approximately 88 percent, of her former job tasks due to the injuries she sustained working for respondent.

Claimant has failed to prove that she has made a good faith effort to find work after she left respondent's employment. Other than working in her parents' liquor store for several weeks commencing in May 2000, claimant has not worked for any other employer. Claimant is not looking for work as she has applied for Social Security disability benefits. Because claimant has failed to prove she has made a good faith effort to find appropriate work, a post-injury wage should be imputed for the wage loss prong of the permanent partial general disability formula.

Although vocational rehabilitation counselor Richard Santner met with claimant to analyze her former jobs and break them down into individual tasks, Mr. Santner did not provide an opinion regarding claimant's post-injury ability to earn wages. Mr. Santner met with claimant in May 2000 when she was working for her parents. According to Mr. Santner, they talked about working at the liquor store and claimant was not having difficulty doing that work. Because the record lacks an expert opinion of claimant's post-injury ability to earn wages, the Board imputes the $7 per hour that she was earning as a liquor store clerk.

The Board rejects respondent's argument that the wages claimant was earning working for respondent should be imputed. First, respondent would not accommodate the medical recommendation from Dr. McKinney that claimant be transferred from the third shift to the first shift to attempt to establish a normal sleep pattern. Second, the evidence fails to establish that respondent was acting in good faith in making claimant read safety manuals her entire work shift or whether it was a meaningless task intended to punish, humiliate, or discourage claimant.

Employees must demonstrate good faith in seeking alternative employment. Similarly, employers must also act in good faith. In providing accommodated employment to a worker, the Court of Appeals has held that the doctrine in *Foulk* is not applicable where

the accommodated job is not genuine[4] or not within the worker's medical restrictions,[5] or where the worker is fired after attempting to work within the medical restrictions and experiences increased symptoms.[6] See *Tharp*, in which the Court of Appeals held that placing an employee in a room waiting for someone to give her work was not sufficient to invoke the presumption of no work disability under K.S.A. 1992 Supp. 44-510e(a). Moreover, according to both claimant and Dr. McKinney, claimant's symptoms worsened while she was assigned the job of reading safety manuals, resulting in Dr. McKinney further restricting claimant's activities.

In considering the entire record, the Board concludes claimant retains the post-injury ability to earn $7 per hour, or $280 per week, and that wage should be used for the wage loss prong in the permanent partial general disability formula.

The parties stipulated claimant's pre-injury average weekly wage was $700.69. Comparing claimant's pre-injury and the imputed post-injury wages, claimant has sustained a 60 percent wage loss.

Averaging claimant's 88 percent task loss with the 60 percent wage loss yields a 74 percent permanent partial general disability.

3. Claimant noted the Judge did not address the request for unauthorized medical benefits and future medical benefits. As provided by the Workers Compensation Act, claimant may request additional medical benefits should the need arise.[7] Further, claimant is entitled to unauthorized medical expense up to the $500 statutory maximum upon presentation to respondent of proof of receiving such services.[8]

AWARD

WHEREFORE, the Board modifies the February 19, 2001 Award and awards claimant a 74 percent permanent partial general disability.

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[4] *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

[5] *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

[6] *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

[7] See K.S.A. 44-510k.

[8] See K.S.A. 1999 Supp. 44-510(c)(2).

Kim D. Hedstrom is granted compensation from Hallmark Cards, Inc., for a March 17, 2000 accident and resulting disability. Based upon an average weekly wage of $700.69, Ms. Hedstrom is entitled to receive 8.57 weeks of temporary total disability benefits at $383 per week, or $3,282.31, plus 252.53 weeks of permanent partial disability benefits at $383 per week, or $96,717.69, for a 74 percent permanent partial general disability and a total award not to exceed $100,000.

As of March 15, 2002, there is due and owing to the claimant 8.57 weeks of temporary total disability compensation at $383 per week in the sum of $3,282.31, plus 95.43 weeks of permanent partial general disability compensation at $383 per week in the sum of $36,549.69, for a total due and owing of $39,832, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $60,168 shall be paid at $383 per week until paid or until further order of the Director.

The Board awards claimant unauthorized medical benefits as provided above. Further, claimant may apply for additional medical benefits as provided by the Act.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of March 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned Board Member and Board Member pro tem respectfully dissent from the opinion of the majority in the above matter. We would find, after viewing the videotapes and the evidence, that claimant misled Dr. Sharon McKinney concerning the extent of her injuries and limitations, thereby unnecessarily creating the severe restrictions

that were placed on claimant by the doctor. Dr. McKinney's opinions regarding restrictions and task loss, therefore, cannot be credible in light of the information from claimant.

In addition, the jobs created by respondent during the treatment with Dr. McKinney met the gradually more severe restrictions of Dr. McKinney necessitated by the claimant's increased complaints. We would find that claimant's decision to terminate her employment with respondent from a job she was physically able to perform violated the policies of *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). The wage claimant was earning at that job should be imputed to her pursuant to K.S.A. 1999 Supp. 44-510e. This Board Member and Board Member pro tem would, therefore, limit claimant's permanent partial general disability to her functional impairment.

BOARD MEMBER

BOARD MEMBER PRO TEM

c: George H. Pearson, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Workers Compensation Director